

ORAL ARGUMENT NOT YET SCHEDULED
No. 24-5173

**In the United States Court of Appeals for the
District of Columbia Circuit**

HON. PAULINE NEWMAN,

Plaintiff-Appellant,

v.

HON. KIMBERLY A. MOORE, IN HER OFFICIAL CAPACITIES AS CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, CHAIR OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT, AND CHAIR OF THE SPECIAL COMMITTEE OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT; HON. SHARON PROST, IN HER OFFICIAL CAPACITY AS MEMBER OF THE SPECIAL COMMITTEE OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT; HON. RICHARD G. TARANTO, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE SPECIAL COMMITTEE OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT; AND JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 23-cv-01334-CRC; Hon. Christopher R. Cooper, Presiding

APPELLANT’S OPENING BRIEF
UNDER SEAL

December 5, 2024

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**CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES
PURSUANT TO CIRCUIT RULE 28(a)(1)**

A. Parties:

The parties in the district court include the Honorable Pauline Newman, United States Circuit Judge of the United States Court of Appeals for the Federal Circuit, the Honorable Kimberly A. Moore, in her official capacities as Chief Judge of the United States Court of Appeals for the Federal Circuit, Chair of the Judicial Council of the Federal Circuit, and Chair of the Special Committee of the Judicial Council of the Federal Circuit; the Honorable Sharon Prost, in her official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit; the Honorable Richard G. Taranto, in his official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit; and the Judicial Council of the Federal Circuit and all Members thereof, in their official capacities.

Disclosure Statement: No Disclosure Statement under Federal Rule of Appellate Procedure 26.1 nor under Circuit Rule

26.1 is necessary, as Plaintiff-Appellant is neither a corporation nor similar entity.

B. Ruling Under Review:

The parties are before this Court on appeal from the February 12, 2024 and July 9, 2024 Memorandum Opinions and Orders of the district court issued by the Hon. Christopher R. Cooper, ECF 43, 49, and 50 in *Newman v. Moore*, No. 23-cv-01334-CRC. The February 12, 2024 Opinion is reported at 717 F.Supp.3d 43 (D.D.C. 2024), and is reproduced at Joint Appendix pp. 147-182. The July 9, 2024 Opinion does not yet appear in the Federal Supplement, but can be found at 2024 WL 3338858 (D.D.C. 2024), and is reproduced at Joint Appendix pp. 209-215. The District Court's final order dismissing the action is reproduced at Joint Appendix p. 200.

C. Related Cases:

There are no related cases pending in this or any other court. The disciplinary proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 remain pending before the Judicial Council of the Federal Circuit and the Committee on

Judicial Conduct and Disability of the Judicial Conference of the
United States.

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GLOSSARY

The Act or

Disability Act: Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, Pub. L. 96-458, 94 Stat. 2036 (96th Cong. 1980)

JA___: Joint Appendix (page number[s])

JC&D: Judicial Conduct and Disability Committee of the
Judicial Conference

R.___: Rules for Judicial-Conduct and Judicial-Disability
Proceedings (rule number[s])

SA___: Supplemental Appendix (page number[s])

INTRODUCTION

For over six decades, the Hon. Pauline Newman has been an intellectual leader in American intellectual property law and industrial policy. In the 1960s, she worked for the United Nations Educational, Scientific and Cultural Organization as a science policy specialist in the Department of Natural Resources. She served on the State Department Advisory Committee on International Intellectual Property from 1974 to 1984 and on the advisory committee to the Domestic Policy Review of Industrial Innovation from 1978 to 1979. From 1982 to 1984, she was Special Adviser to the United States Delegation to the Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property. She was one of the main advocates for the creation of a unified court for patent law issues—advocacy that resulted in the creation of the United States Court of Appeals for the Federal Circuit on which she now sits. In 1984, President Ronald Reagan, with the unanimous advice and consent of the United States Senate, appointed Judge Newman to that newly created court. Judge Newman was the first judge appointed directly to the Federal Circuit. She has continued to honorably serve in her position as a Circuit Judge ever since. She has

published over 2,000 majority, concurring, and dissenting opinions. Her dissents have been routinely vindicated by the United States Supreme Court, including as recently as this year. Judge Newman has received wide recognition and numerous awards for her myriad contributions to the law.

Though advanced in age, Judge Newman retains her sharp intellect, and both lay and expert witnesses have described her as an “unusually cognitively intact ... woman” whose cognitive and physical abilities make her appear “20 or more years younger than her stated age.” Expert Report of Aaron G. Filler, MD, PhD, JD at 28, <https://tinyurl.com/5eczch9>. Her written opinions and oral presentations show no signs of deterioration. Because she has chosen not to retire or take senior status, *see* 28 U.S.C. § 371, she continues to hold office as a duly confirmed United States Circuit Judge in active service.

Despite her constitutional status, Defendants-Appellees, relying on the Judicial Conduct and Disability Act (“the Disability Act” or “the Act”), for the last year-and-a-half, have precluded Judge Newman from exercising *any* functions of her office, including hearing cases, writing opinions, ruling on motions, voting on petitions to hear cases *en banc*, and

the like. Though she draws a salary, Judge Newman has been prevented from acting as a judge. Defendants-Appellees admit that under their issued orders, Judge Newman may never again be permitted to hear any cases, *see* ECF 36 at 3-4, yet, at no point have Defendants-Appellees suggested that Judge Newman be impeached. Nevertheless, Judge Newman has been functionally removed from office. Removal without impeachment is wholly inconsistent with the Framers' carefully calibrated system of checks and balances. If the Disability Act authorizes such an outcome, it is unconstitutional.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction in this matter pursuant to 28 U.S.C. § 1331. It issued a final order dismissing the case on July 9, 2024. JA200. Judge Newman filed a timely Notice of Appeal on July 10, 2024. JA216. *See* Fed. R. Civ. P. 4(a)(1)(B).

Because the decision of the District Court is a “final decision” within the meaning of 28 U.S.C. § 1291, this Court has jurisdiction over the appeal.

STATEMENT OF THE ISSUES

1. Is an Act that authorizes suspensions of a duly confirmed Article III judge from all judicial duties unconstitutional?
2. Do recurrent suspensions violate the Disability Act's (to the extent that it is constitutional) strictures that any suspension must be for "temporary basis [and] time certain"?
3. Do federal courts have jurisdiction over "as applied" constitutional challenges to the Disability Act?

STATEMENT OF THE CASE

I. THE JUDICIAL CONDUCT AND DISABILITY ACT

In 1980, following years of debate, *see generally* Walter F. Pratt, *Judicial Disability and the Good Behavior Clause*, 85 Yale L.J. 706, 706-07 (1976), Congress enacted the Disability Act. Pub. L. 96-458, 94 Stat. 2035, 2036-41 (Oct 15, 1980), *codified in* 28 U.S.C. §§ 351-364. The Act authorizes the Judicial Council of the relevant circuit¹ to conduct investigations into alleged misconduct or disability of circuit and district

¹ Unlike other judicial councils, the Judicial Council for the Federal Circuit is composed of only the active judges of the Federal Circuit. *See* United States Court of Appeals for the Federal Circuit, Judicial Council, <https://perma.cc/2AF4-LG8R>.

judges within that circuit's jurisdiction. *See* 28 U.S.C. §§ 353, 354, 356, 363. The Judicial Conference of the United States promulgated Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Conduct Rules") which govern the processing of disciplinary and disability complaints against federal judges.²

Under the Conduct Rules, the chief judge can "identify a complaint" whenever "a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability ... even if no related complaint has been filed." R. 5. If the chief judge does so, she must conduct a review and either dismiss the complaint or refer it to a "special committee" of the Judicial Council. R. 11(a). Such a committee is charged with "determin[ing] the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee's preliminary inquiry," R. 13(a), including by "request[ing] the judge to undergo a medical or psychological

² The rules can be found on the United States Courts' website. *See* <https://tinyurl.com/4x4xpnxt>.

examination,” and “review[ing] existing records, including medical records.” R. 13(a), cmt.

Once the special committee concludes its investigation, it “must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action.” R. 17; *see also* 28 U.S.C. § 353(c). Following the subject judge’s response, the Judicial Council may “take remedial action.” R. 20(b)(1)(D). One such “remedial action” that the Disability Act and the Conduct Rules purport to authorize is an issuance of an “order[] that no new cases be assigned to the subject judge for a limited, fixed period.” R. 20(b)(1)(D)(ii). *See also* 28 U.S.C. § 354(a)(2)(A)(i).

Any decision by the Judicial Council is appealable to the Committee on Judicial Conduct and Disability and potentially, the Judicial Conference of the United States. R. 20. Finally, in order to deal with situations “where there are multiple disqualifications among the original judicial council, [or] where the issues are highly visible and a local disposition may weaken public confidence in the process,” the Conduct Rules authorize the “chief judge or [the] judicial council [to] ask the Chief

Justice to transfer a proceeding based on a complaint identified under Rule 5 ... to the judicial council of another circuit.” R. 26 and cmt.

Although conducted by federal judges, such proceedings “are administrative, and not judicial, in nature.” *In re Complaint of Judicial Misconduct*, C.C.D. 23-01, at 16 (Jud. Conf. Feb. 7, 2024) (quoting *In re Complaint of Judicial Misconduct*, C.C.D. 09-01, at 20-21 (Jud. Conf. Oct. 26, 2009)). The Disability Act also limits judicial review of the orders issued pursuant to the Act. *See* 28 U.S.C. § 357(c).

II. THE ALLEGATIONS AGAINST AND INVESTIGATION INTO JUDGE NEWMAN

As noted, Pauline Newman, is Judge of the Federal Circuit. At all relevant times, Judge Newman has been and is in sound physical and mental health, has been willing and able to fully participate in the work of the Court, and, consistent with the Court’s internal practice and procedures for active-status judges, has requested to be assigned to the regular panel sittings of the Court. She has authored majority and dissenting opinions in the whole range of cases before her Court, has voted on petitions for rehearing *en banc*, and has joined in the *en banc* decisions of the Court. She is noted for her frequent, incisive dissents

and has been referred to as the Federal Circuit’s Great Dissenter. As Chief Judge Kimberly A. Moore herself noted, “[a]mong patent practitioners, Judge Newman is particularly well-known for her insightful dissents, which have often been vindicated by the Supreme Court.” On more than one occasion the Supreme Court “adopt[ed] essentially the reasoning of Judge Newman’s dissent.” Kimberly Moore, *Anniversaries and Observations*, 50 AIPLA Q. J. 521, 524-25 (2022). See also *Rudisill v. McDonough*, 601 U.S. 294 (2024), reversing 55 F.4th 879 (Fed. Cir. 2022) (*en banc*) (adopting Judge Newman’s view of the law).

In part because Judge Newman frequently writes separate opinions, and in part because she takes extraordinary pains to ensure that her opinions fully reflect her views and remain consistent from case to case and year to year, Judge Newman is and has been well-known for being “slow” to issue her decisions.³ But Judge Newman’s decisions

³ Independent analysis of the data from the Federal Circuit strongly suggests that Judge Newman’s speed of opinion production is fully in line with that of her colleagues. See Ron D. Katznelson, Ph.D., *Is There a Campaign to Silence Dissent at the Federal Circuit?* at 18, available at <https://ssrn.com/abstract=4489143>. Nor does the quantity of opinions Judge Newman produces deviate from that of her colleagues. *Id.*

have never been criticized for being poorly argued or written, and indeed, have been universally praised for their clarity and insight.

Judge Newman continued to write opinions through 2023. These recent opinions were praised by various members of the bar, and nothing therein suggests any mental disability. Andrew Michaels, *Judge Newman's Recent Dissents Show She Is Fit For Service*, Law360.com (June 6, 2023).

On March 24, 2023, Kimberly Moore, the Chief Judge of the Federal Circuit, “identified a complaint” against Judge Newman alleging that “there is probable cause to believe that Judge Newman’s health has left her without the capacity to perform the work of an active judge,” and issued an order launching an investigation into Judge Newman. Chief Judge Moore relied on several unfounded predicates. First, Judge Moore alleged (without providing any basis or source for this allegation) that “in the summer of 2021, Judge Newman, at the age of 94, was hospitalized after suffering a heart attack and having to undergo coronary stent surgery,” and that (again without providing any evidence or source for the allegation) “on May 3, 2022, Judge Newman fainted following an argument and was unable to walk without assistance.” March 24, 2023